

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARCEL STONER,

Petitioner,

No. C 07-6385 PJH (PR)

vs.

J. HARTLEY, Warden,

Respondent.

**ORDER GRANTING LEAVE
TO PROCEED IN FORMA
PAUPERIS AND DISMISSING
PETITION WITH LEAVE TO
AMEND**

Petitioner, a California prisoner currently incarcerated at Avenal State Prison, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He also requests leave to proceed in forma pauperis.

Venue is proper because the conviction was obtained in Alameda County, which is in this district. See 28 U.S.C. § 2241(d).

BACKGROUND

Petitioner pleaded guilty to attempted murder charges. With enhancements, he was sentenced to prison for twenty-two years. He did not appeal, but has filed state habeas petitions raising the issue presented here.

DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). It shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant

or person detained is not entitled thereto." *Id.* § 2243.

B. Legal Claims

Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must "specify all the grounds for relief which are available to the petitioner ... and shall set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. "[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)). "Habeas petitions which appear on their face to be legally insufficient are subject to summary dismissal." *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

Petitioner's claim is that his sentence violated the Sixth Amendment. In the portion of the form complaint for facts supporting the claim he has written: "Petitioner was sentenced beyond the statutory maximum as prohibited by the U.S. Supreme Court in Apprendi, Blakely, and Cunningham." This is insufficient. Petitioner does not say what actually occurred at sentencing that violated his rights. It may be guessed that it involved the enhancements, but he does not say so, nor does he say that he did not admit the facts used to enhance. The petition therefore will be dismissed with leave to amend to provide facts showing a "real possibility of constitutional error." See *Aubut*, 431 F.2d at 689.

CONCLUSION

1. Leave to proceed in forma pauperis (document number 2 on the docket) is **GRANTED**.

2. The petition is **DISMISSED** with leave to amend within thirty days from the date of this Order. The amendment must include the caption and civil case number used in this Order and the words AMENDED PETITION on the first page. Failure to amend within the designated time will result in the dismissal of the case.

1 3. Petitioner must keep the court informed of any change of address and must
2 comply with the court's orders in a timely fashion. Failure to do so may result in the
3 dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure
4 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable
5 in habeas cases).

6 **IT IS SO ORDERED.**

7 Dated: December 20, 2007.



PHYLLIS J. HAMILTON
United States District Judge